Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCC)-842–04 OF 2017
HAMID SULTAN, HASNAH HASHIM AND YEOH WEE SIAM JJCA
21 FEBRUARY 2018

Companies and Corporations — Shares — Valuation — Sale of shares — Order for buy-out shares — Valuation report prepared by mutually agreed valuer — Whether buy-out order good, valid and intact — Whether status ante of petitioner ought to be restored — Companies Act 1965 s 181

The petitioner filed a petition pursuant to s 181 of the Companies Act 1965 ('the s 181 petition') on the grounds that the first and second respondents breached a joint venture agreement ('the JVA') entered between United Engineers Bhd ('UEM') and the second respondent. The first respondent was incorporated pursuant to the said JVA. Allowing the s 181 petition, the High Court concluded that the second respondent acted in an oppressive manner in the affairs of the first respondent. The petitioner was not satisfied with the value of its 30% shareholding valued at RM35.97m, assessed by the valuer. The petitioner filed a notice of application ('encl 80') to make representation on the valuation report and to call expert evidence in court. The second respondent filed a notice of application ('encl 84') for the court to determine the final value of the buy-out of the petitioner's shares and for consequential orders to give effect to the purchase of the shares. The High Court dismissed encl 80 and allowed encl 84. Dissatisfied, the petitioner filed an appeal against the decision of the High Court with respect to encls 80 and 84. The Court of Appeal affirmed the decision of the High Court. The petitioner appealed to the Federal Court and the appeal was allowed. The second respondent filed for an order to execute the buy-out order and the application was allowed. The High Court dismissed the petitioner's petition to restore the status ante of petitioner in the first respondent's prevailing immediately prior to the court's order. The High Court was of the view that the buy-out order pursuant to the High Court order remained intact and unchallenged as there was no appeal by the petitioner against that order of the High Court. Hence the present appeal.

Held, dismissing appeal:

(1) The court was not persuaded to restore the status ante of the petitioner in the first respondent. The court concurred with the High Court that the buy-out order remained unchallenged by the petitioner. The buy-out order was still good, valid and intact. The sum of RM35.97m has been

paid to the petitioner. The proceedings in the High Court would determine the final value of the shares in accordance to the buy-out order (see para 11).

[Bahasa Malaysia summary

Pempetisyen memfailkan satu petisyen bawah s 181 Akta Syarikat 1965 ('petisyen 181') atas alasan bahawa responden pertama dan kedua melanggar perjanjian usaha sama ('JVA') yang dimeterai antara United Engineers Bhd ('UEM') dengan responden kedua. Responden pertama diperbadankan susulan JVA ini. Membenarkan petisyen s 181, Mahkamah Tinggi menyimpulkan bahawa responden kedua bertindak secara menindas dalam hal ehwal responden pertama. Pempetisyen tidak berpuas hati dengan nilai pegangan saham sebanyak 30% yang dinilai sebanyak RM35.97 juta, dinilai oleh penilai. Pempetisyen memfailkan notis permohonan ('lampiran 80') untuk membuat pewakilan laporan penilaian dan mengemukakan keterangan pakar di mahkamah. Responden kedua memfailkan notis permohonan ('lampiran 84') agar mahkamah memutuskan penilaian akhir untuk membeli saham pempetisyen dan perintah-perintah sampingan untuk menguatkuasakan saham beli-keluar. Mahkamah Tinggi menolak lampiran 80 dan membenarkan lampiran 84. Tidak berpuas hati, pempetisyen memfailkan rayuan terhadap keputusan Mahkamah Tinggi bagi lampiran 80 dan 84. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Pempetisyen merayu ke Mahkamah Persekutuan dan rayuan tersebut dibenarkan. Responden kedua memfailkan perintah melaksanakan perintah beli-keluar dan permohonan ini dibenarkan. Mahkamah Tinggi menolak petisyen pempetisyen untuk mengembalikan status ante pempetisyen dalam responden pertama serta merta sebelum perintah mahkamah. Mahkamah Tinggi berpendapat perintah beli-keluar bawah perintah Mahkamah Tinggi kekal tidak terjejas dan tidak tercabar kerana tiada rayuan oleh pempetisyen terhdap perintah Mahkamah Tinggi. Oleh itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Mahkamah tidak bersetuju untuk mengembalikan status ante pempetisyen dalam responden pertama. Mahkamah bersetuju dengan Mahkamah Tinggi bahawa perintah beli-keluar kekal tidak dicabar oleh pempetisyen. Perintah beli-keluar masih baik, sah dan tidak terjejas. Jumlah RM35.97 juta telah dibayar kepada pempetisyen. Prosiding dalam Mahkamah Tinggi akan menentukan jumlah akhir saham menurut perintah beli-keluar (lihat perenggan 11).]

Notes

For cases on valuation, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1280–1291.

Cases referred to

Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal [2017] 1 MLJ 301; [2017] 2 CLJ 32, FC (refd)

Legislation referred to

Companies Act 1965 s 181
Companies Regulations 1966 Form 32A

Appeal from: Civil Suit No D-26NCC-42 of 2011 (High Court, Kuala Lumpur)

Gopal Sri Ram (Emily Wong and David Yii with him) (Dennis Nik & Wong) for the appellant.
John Skelchy (James Monteiro) for the first respondent.
Gopal Sreenevasan (PL Leong with him) (Sreenevasan Young) for the second and third respondents.

Hasnah Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the learned High Court judge made on 27 March 2017 dismissing the appellant/petitioner's notice of application dated 22 August 2016 for an order to restore the status ante of the petitioner in the first respondent. We had, after perusing the records of appeal and hearing and considering the written and oral submissions of learned counsels for the parties, found no merits in the appeal. We unanimously dismissed the appeal with costs of RM10,000 to the respondents subject to the payment of allocator. The deposit to be refunded. These are our reasons in full.

[2] For the purpose of this judgment, the parties will be referred to as they were referred to in the High Court.

THE PETITIONER'S NOTICE OF APPLICATION

[3] In the notice of application (encl 167), the petitioner had applied for the following orders, inter alia:

(a) to restore the status ante of the petitioner in the first respondent prevailing immediately prior to the court's order dated 18 July 2013;

(b) that the petitioner be restored to the register of the first respondent as the registered owner of 30% of the share in the first respondent; and

(c) that two persons nominated by the petitioner be appointed as directors of the board of directors of the first respondent.

BACKGROUND

[4] The petitioner filed a petition pursuant to s 181 of the Companies Act 1965 ('the 181 petition') on the grounds that the first and second respondent breached a joint venture agreement dated 12 September 1995 ('the JVA') entered between United Engineers Bhd ('UEM') and the second respondent. The first respondent was incorporated pursuant to the said JVA. Under the terms of the JVA, UEM held 30% shareholding and the second respondent held 70% in the first respondent.

[5] On 27 March 2012 after a full hearing, the High Court concluded that the second respondent had acted in an oppressive manner in the affairs of the first respondent company. The High Court allowed the 181 petition and granted the following reliefs:

(a) the second respondent buys out all 4,500,000 shares of the petitioner in the first respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis. The valuation to be as at the date of the order;

(b) the appointment of an independent valuer to be mutually agreed by the petitioner and the second respondent. In the event the parties could not agree to the independent valuer, the parties at liberty to apply to the court to appoint a valuer;

(c) the valuation to be done within three months from the date of the order. The parties may make representations to the valuer as to the valuation;

(d) the valuer appointed shall file the valuation report into court and the parties may apply;

(e) the court will determine the final value of the shares and the terms of the buy-out order;

(f) the costs of the valuation to be borne by the first respondent; and

(g) the second respondent and petitioner shall be at liberty to apply.

[6] Ferrier Hodgson MH Sdn Bhd ('Ferrier') was mutually appointed by the parties to the 181 petition as the valuer to conduct the valuation of the shares for the buy-out exercise. Ferrier completed the valuation and submitted the final valuation report dated 31 December 2012. The petitioner, however was not satisfied with the value of its 30% shareholding valued at RM35.97m assessed by Ferrier. The petitioner claimed that the fair market value of the shares was RM262m.

A **[7]** Dissatisfied with the valuation the petitioner filed a notice of application dated 26 February 2013 (encl 80) to make representation on the valuation report and to call expert evidence in court. The grounds of the application, inter alia, were as follows:

B (a) there are express provisions in the buy-out order that state that parties are at liberty to apply. The court always retains the power to make further orders ancillary to or in relation to the valuation report;

C (b) Ferrier prepared a draft valuation report which invited parties to comment on it. The petitioner had responded by counter offering a valuation done by Hartanah Consultants (Valuation) Sdn Bhd ('Hartanah');

D (c) Ferrier applied the wrong considerations when it relied on the valuation report of Henry Butcher in respect of the value of the land and disregarded the higher valuation conducted by Hartanah on the gross development value of the most priced asset of the first respondent company; and

E (d) the petitioner averred that it would be just and reasonable that sufficient material be provided for an adequate valuation.

[8] The second respondent subsequently filed a notice of application dated 15 March 2013 (encl 84) for the court to determine the final value of the buy-out of the petitioner's shares and for consequential orders to give effect to
F the purchase of the shares. The learned High Court judge heard both the applications in encls 80 and 84. After having considered the submissions of the parties the learned High Court judge dismissed encl 80 and allowed encl 84. The court ordered the final buy-out value of the petitioner's shares as follows:

G (a) the second respondent shall buy the petitioner's shares in the first respondent at RM7.99 per share and the aggregate purchase price of the shares fixed at RM35.97m ('the purchase price');

H (b) the buy-out must be completed no later than four months after the date of the order; and

(c) the petitioner to procure the resignation of Mr Yeoh Keng Tat as director of the first respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

I **[9]** Dissatisfied with the decision of the High Court, the petitioner filed an appeal against the decision of the learned High Court judge with respect to encls 80 and 84. The Court of Appeal heard the appeal and affirmed the decision of the High Court judge. The petitioner subsequently appealed to the

Federal Court and on appeal to the Federal Court the petitioner's appeal was allowed. The decisions of the courts below were reversed. The Federal Court ordered, inter alia, as follows:

(a) the decision of the High Court and the Court Appeal in respect of encls 80 and 84 be set aside;

(b) order in terms of encl 80; and

(c) cross-examination of expert witnesses in respect of the valuation reports to be conducted before another High Court judge.

[10] The second respondent filed for an order to execute the buy-out order. On 25 February 2014 the senior assistant registrar allowed the second respondent's application and made the following orders:

(a) that the petitioner having failed and/or refused on 11 November 2013 to deliver to the second respondent the form of transfer of shares in respect of the transfer by the petitioner in favour of the second respondent of 4,500,000 ordinary shares of RM1 each in the capital of the first respondent upon receipt from the solicitors of the second respondent of their written confirmation to the court that they have in possession the cashier's orders or banker's cheques the said form of transfer of shares (Form 32A) be executed by the Registrar of the High Court for and behalf of the petitioner and delivered to the second respondent's solicitors;

(b) that the second respondent be directed to deliver to its solicitors as stakeholder, cashier's orders or banker's cheques made payable to 'Chellam Wong' for the following amounts:

  (i) the total amount of RM35,970,000 being the purchase price for the shares; and

  (ii) RM576,505.48 being the amount of interest computed at 5%pa from 18 July 2013;

(c) Mr Yeoh Keng Tat be deemed to have ceased to be a director of the first respondent; and

(d) the petitioner pay costs of RM10,000 each to the first respondent and the second respondent.

THE HIGH COURT

[11] The learned High Court judge having considered the submissions of the parties, dismissed the application of the petitioner to restore the status ante of the petitioner in the first respondent prevailing immediately prior to the court's order dated 18 July 2013. His Lordship was of the considered view that

A the buy-out order pursuant to the High Court order dated 27 March 2012 remained intact and unchallenged as there was no appeal by the petitioner against that order of the High Court. What the petitioner had attempted to do was to challenge the order by filing the notice of application in encl 167. The mode taken to challenge the said buy-out order by filing encl 167 was wrong B and an abuse of process of the court. The learned High Court judge found that the petitioner was barred by the doctrine of res judicata from filing encl 167 in its attempt to challenge the buy-out order.

C **[12]** The questions posed to the Federal Court in the petitioner's notice of motion for leave to appeal to the Federal Court were restricted to matters in relation to the valuation of the petitioner's shares in the first respondent and not the buy-out order.

D OUR DECISION

[13] Learned counsel for the petitioner submitted that it is trite law that a successful appellant has a restituitionary right to any property transferred under any judgment of the court which is reversed. When an order is set aside E on appeal, the court has the inherent jurisdiction to make restitution and to restore the parties' position prior to the impugned order granted. Therefore, with the Federal Court order setting aside the High Court dated 18 July 2013, it would mean that the petitioner was entitled to the restoration of the status ante of the parties.

F **[14]** It was further argued that since the order dated 18 July 2013 and the consequential orders have been set aside by the Federal Court, the petitioner must be restored to its original position as the buy-out has not been completed. The restoration will preserve the integrity of the order made on 27 March G 2012.

[15] Having heard parties and having perused the appeal records, we were not persuaded that we should restore the status ante of the petitioner in the first respondent. In short, we concurred with the learned High Court judge that the H buy-out order remains unchallenged by the petitioner. The buy-out order dated 27 March 2012 is still good, valid and intact. The Federal Court in its grounds of judgment in the appeal (re: *Zen Courts Sdn Bhd v Bukit Jalil Development Sdn Bhd & Ors and another appeal* [2017] 1 MLJ 301; [2017] 2 CLJ 32) had given clear orders:

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> Effectively, the new judge is to hear encl 84 and determine the final value of the shares, in accordance with Abdul Aziz J's direction. This setting aside order, by no stretch of the imagination had set aside the buy-out order of 27 March 2012 or taken away the essence of the agreement. In short, this buy-out order is still good, valid and intact.

[16] The sum of RM35.97m has been paid to the petitioner. The proceedings in the High Court will determine the final value of the shares in accordance to the buy-out order ie whether the value of the share is RM35.97m or RM262m as claimed by the petitioner.

CONCLUSION

[17] For the above reasons we unanimously dismissed the appeal. We ordered costs of RM5,000 to each set of respondents' solicitors subject to payment of allocator. We also ordered that the deposit be refunded to the petitioner.

Appeal dismissed.

Reported by Afiq Mohamad Noor